Supreme Court, U.S.
FILED

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No. 96-1940 JUN 4 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THE JAQUES ADMIRALTY LAW FIRM,

Petitioner,

v.

ACandS, Inc., ACMC f/k/a National Gypsum Company, ACME Brick Co., Acorn Iron and Supply Co., Allis-Chalmers Corp., The Allpax Co., Inc., Anchor Packing Co., Argo International Corp., Armstrong World Industries, Auburn Manufacturing Co., Aurora Pump Division of General Signal Corp., Bethlehem Steel Corp., Bigelow-Liptak Corp., A. B. Boyd Co., Bryan Steam Corp., Carborundum Co., Certainteed Corp., Champion International, Chemseco, Coffin Pump, Inc., Coltec Industries Inc., Alfred Conhagen Inc., Crosby Steam and Valve Co., Crown, Cork and Seal Co., Inc., Dana Corp., The Darcoid Co., Inc., Donlee Technologies, Inc., Durabla Manufacturing Co., Ellicott Machine Corp., Elliot Co., Everlasting Valve Co., Excelsior Inc., Fel-Pro Inc., Felt Products Inc., Fibreboard Corp., Flexitallic, Inc., Flintkote Co., GAF Corp., Gatke Corp., General Cable Co., General Refractories, Goodall Rubber Co., B. F. Goodrich, Goodyear Tire & Rubber Co., Goulds Pumps Inc., A. P. Green Industries, Inc., Greene Tweed and Co., Hajoca Corp., Harbison-Walker Refractories Group, The Home Rubber Co., Indian Head Industries, Inc., Ingersoll-Dresser Pump, Ingersoll-Rand Corp., James Walker Manufacturing Co., Janos Industrial Insulation Corp., John Crane Inc., La Favorite Industries, Inc., The Lunkenheimer Co., Melrath Gasket, Inc., Morrison Bros. Co., Mortell Co., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., USX Corp., Warren Pumps, Inc., Pittsburgh Corning Corp., PPG Industries, Inc., Noland Co.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was denied due process of law by the failure of the court below to provide or require proper notice prior to imposition of appellate sanctions?

II.

PARTIES TO THE PROCEEDING

The Petitioner

Although Alan Kellman, Esq., affixed his signature for the Law Firm to the pleadings to this cause, he was acting in a representative capacity for the Law Firm and in reality, the Jaques Admiralty Law Firm is comprised of a group of lawyers who are associates of the Firm and are counsel for each of the respective Plaintiffs of this cause. Therefore, the sanctions imposed were indeed borne by the Jaques Admiralty Law Firm. Hereafter, the party known to have been sanctioned is the Jaques Admiralty Law Firm.

Parties to the proceeding in the Court whose judgment is sought to be reviewed:

The plaintiff-appellants:

> Norman D. Abar, et al. and Creighton E. Miller, Administrator for the Estate of Isaac W. Abraham, et al.
>
> * Although plaintiff-appellants were parties to the appeal below, they have no interest in this attorney sanctions appeal.

The defendant-appellees:

> ACandS, Inc., Alfred Conhagen, Inc., Anchor Packing Co. & Coltec Industries, Aurora Pump Division of General Signal Corp., B.F. Goodrich, Champion International, Coffin Turbo Pump, Inc., Durable Manufacturing Co., Elliot Co., Everlasting Valve Co., Excelsior Inc., Fel-Pro Inc. & Felt

II.

PARTIES TO THE PROCEEDING – Continued

Products Manufacturing Co., Flintkote Co., General Cable Co., Goodyear Tire & Rubber Co., Greene Tweed Co., The Home Rubber Co., Indian Head Industries, Inc., Ingersoll-Dresser Pump Co., James Walker Manufacturing Co., Mortell Co., Norton Co., The Okonite Co., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., PPG Industries, Inc., Pittsburgh Corning Corp., Plibrico Co., Quaker Construction Products Co., Sherwin-Williams Co., USX Corp., Vellumoid, Inc., Viking Pump, Inc., Warren Pumps, Inc.

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III.

OPINIONS AND ORDERS REPORTED

None of the opinions or orders entered in the underlying litigation have been reported "officially". The Ninth Circuit's decision affirming the district court and imposing sanctions is listed as a "table case" at 83 F.3d 426 (9th Cir. 1996). That decision is reported unofficially at 1996 WL 183752.

IV.

BASIS OF JURISDICTION

A. Jurisdiction in this Court

Pursuant to Supreme Court Rule 14(e), Petitioner states that jurisdiction lies in this Court by virtue of the following:

(i) Date judgment or order sought to be reviewed was entered:

> The United States Court of Appeals for the Ninth Circuit filed its Memorandum affirming the ruling of the United States District Court for the Southern District of California on April 16, 1996; the Memorandum also granted sanctions pursuant to Fed. R. App. P. 38 against Plaintiffs-Appellants' attorney. [App. 1]
>
> A Judgment in accordance with the Ninth Circuit's ruling was filed on July 8, 1996 [App. 79].
>
> On April 19, 1996, the Ninth Circuit's Appellate Commissioner filed his Order for submission of applications for attorneys' fees and

double costs to be awarded as sanctions against Plaintiffs-Appellants' attorney [App. 46]. This Order gave Defendants-Appellees 30 days in which to file their applications for attorneys' fees and double costs, and required Plaintiffs-Appellants' attorney to file a response within 45 days. Plaintiffs-Appellants filed a timely response to all applications which were filed within the requisite time period and served on their attorney.

On April 30, 1996, Plaintiffs-Appellants filed their Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond [App. 69].

On June 7, 1996, the Ninth Circuit denied Plaintiffs-Appellants' Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond [App. 77].

On September 16, 1996, the Appellate Commissioner filed his Order quantifying the amount of the award of attorneys' fees and double costs [App. 22].

On September 30, 1996, Plaintiffs-Appellants filed their Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs [App. 9].

(ii) Date of orders respecting rehearing:

On March 6, 1997, the United States Court of Appeals for the Ninth Circuit filed its Order denying Plaintiffs-Appellants' Motion for Reconsideration of Portions of the Appellate

Commissioner's Order Granting Attorneys' Fees and Double Costs [App. 7].

(iii) Petitioner does not rely on Rule 12.5.

(iv) Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question:

> This Court has jurisdiction to review the Judgment and Orders in question pursuant to 28 U.S.C. § 1254, which states:
>
> > Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> >
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]
>
> Under Supreme Court Rule 13.1, this Petition is timely as it is being filed within 90 days of the Ninth Circuit's March 6, 1997, Order denying reconsideration.

(v) This provision is not applicable to this proceeding.

B. Jurisdiction in the Lower Courts

The Complaint filed on July 22, 1993, in the United States District Court for the Southern District of California alleged federal question jurisdiction and diversity jurisdiction under 28 U.S.C. § 1332 and was an admiralty case within the meaning of Fed. R. Civ. P. 9(h). An Order dismissing the Complaint was entered on January 18, 1994. On January 31, 1994, Plaintiffs filed a Motion for

Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). This Motion was denied on March 14, 1994, via the District Court's Order Denying Motion for Relief from Judgment of Dismissal.

A Claim of Appeal as of right from the District Court's Order was timely filed in the United States Court of Appeals for the Ninth Circuit on April 14, 1997.

V.

CONSTITUTIONAL PROVISIONS AND COURT RULES PRIMARILY RELIED UPON BY PETITIONER

Fed. R. App. P. 38, as amended April 29, 1994, effective December 1, 1994, provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

The Due Process Clause to the Fifth Amendment of the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

VI.

STATEMENT OF THE CASE

The relevant facts are few, and not in dispute. In the underlying cases the petitioner brought suit on behalf of numerous merchant mariners who were exposed to the respondents' asbestos products during their sailing

careers. Respondents moved the district court for dismissal based upon Fed. R. Civ. P. 8(a). Those motions were granted. The merchant mariners sought relief under Fed. R. Civ. P. 60(b), which the district court denied. The merchant mariners appealed the latter ruling to the United States Court of Appeals for the Ninth Circuit.

Although the Ninth Circuit stated in its Memorandum that "[s]everal defendants" had requested sanctions, counsel has reviewed the briefs and related joinder papers filed by the Appellees and has found only **one** respondent which requested sanctions, namely Owens-Illinois. *See* Owens-Illinois' Brief in No. 94-55624 at 12-13, 19 [App. 62]; Owens-Illinois' Brief in No. 94-55677 at 12-13, 19 [App. 55]. In its brief, Owens-Illinois asked for Rule 38 sanctions. **None** of the other Appellees even cited Rule 38 in their papers, much less asked for sanctions.

By Memorandum dated April 16, 1996 [App. 1], a panel of the Ninth Circuit rejected the appeal and affirmed the decisions of the district court. The final paragraph of the Memorandum recites in full:

> Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

Pursuant to the award of sanctions in the Court's Memorandum, on April 19, 1996 the Appellate Commissioner issued an Order for the defendant-appellees to submit applications for double costs and attorneys' fees within 30 days, and for plaintiffs' counsel to respond to those applications within 45 days [App. 46].

The Memorandum Disposition and the Commissioner's Order were mailed together, and were received in Detroit by plaintiffs' counsel on April 23, 1996. After receipt of the Ninth Circuit's Memorandum, Plaintiffs-Appellants filed their Motion to Vacate Summary Imposition of Rule 38 Sanctions [App. 69]. Relying on Fed. R. App. P. 38, as amended on April 29, 1994, the Motion asserted that because there was no separately filed motion or notice from the Ninth Circuit that sanctions were being contemplated and no reasonable opportunity to respond, the award of sanctions was improper. Without providing any reasons or law supporting its ruling, even in the face of the plain language of Rule 38, the Ninth Circuit summarily denied Plaintiffs-Appellants' Motion to Vacate on June 7, 1996 [App. 77].

In the intervening time period, on April 19, 1996, the Ninth Circuit's Appellate Commissioner issued his Order requiring submission of applications for attorneys' fees and double costs to be awarded as sanctions against Plaintiffs-Appellants' attorney [App. 46]. The Order gave Defendants-Appellees 30 days in which to file their applications, and required a response by Plaintiffs-Appellants' attorney within 45 days of the Order. Plaintiffs-Appellants filed timely responses to all applications that were properly filed and served on their attorney. The

Appellate Commissioner thereafter filed an Order quantifying the amount of the award on September 16, 1996 [App. 22]. In accord with *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La.*, 38 F.3d 1414 (5th Cir. 1994), the award of Rule 38 sanctions became appealable as of that date. Plaintiffs-Appellants sought reconsideration of portions of that award by Motion filed on September 30, 1996 [App. 9]. Because the Ninth Circuit denied the Motion on March 6, 1997, Petitioner now seeks a Writ of Certiorari from this Court.

VII.

ARGUMENT

A. Grounds for Grant of Certiorari

Petitioner urges the grant of a writ of certiorari pursuant to this Court's Rule 10, as follows:

(1) The decision by the United States Court of Appeals for the Ninth Circuit in the underlying case is contrary to the decisions of every federal court of appeals which has addressed Federal Rule of Appellate Procedure 38, as amended in 1994;

(2) The United States Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10(a));

(3) The United States Court of Appeals for the Ninth Circuit "has decided an important question of federal law [albeit *sub silentio*] that has not been, but should be, settled by this Court".

(Rule 10(c)). That question is whether strict compliance is required with the procedural provisions of Federal Rule of Appellate Procedure 38.

B. The Undisputed Facts Show that the Ninth Circuit Disregarded the Express Mandate of Rule 38.

1. A Very Clear Provision

Fed. R. App. P. 38, as amended April 29, 1994, effective December 1, 1994, provides:

> If a court of appeals determines that an appeal is frivolous, it may, ***after a separately filed motion or notice from the court and reasonable opportunity to respond,*** award just damages and single or double costs to the appellee.

(Emphasis supplied.) As the Advisory Committee Note to the 1994 amendment explains:

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion

> filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

One commentator on federal procedure notes that promulgation of the amended Rule has settled a previous split of authority over proper procedure to be followed in imposing sanctions. 9 James W. Moore, et al., *Moore's Federal Practice* ¶ 238.04 at pages 38-20, 38-21 (2d ed. 1996). The commentator goes on to state:

> What constitutes notice? A statement or request in a brief does not. Only a separately filed motion is sufficient; absent a motion, the notice must come from the court.

Id. There is no dispute that the requisite prior notice never was given.

2. Rule 38's Plain Meaning Must Govern.

As this Court has recognized, rules of court, like other statutes[1], are to be accorded their plain meaning. In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), this Court refused to extend Fed. R. Civ. P. 11 to permit imposition of sanctions against law firms:

---

[1] For the proposition that statutes ought to be applied in accord with their plain meaning, *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (plain meaning of legislation normally should be conclusive); *Demerest v. Manspeaker*, 498 U.S. 184 (1991) (when court finds statute unambiguous judicial inquiry is complete); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (where intent of Congress is clear, that is the end of the matter).

> We give the Federal Rules of Civil Procedure their plain meaning, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750, n. 9, (1980), and generally with them as with a statute, "[w]hen we find the terms . . . unambiguous, judicial inquiry is complete," *Rubin v. United States*, 449 U.S. 424, 430 (1981).

The Court wrote that "Our task is to apply the text, not to improve upon it." 493 U.S. at 126. The Court also rejected arguments to the effect that "the Rule does not mean what it most naturally seems to say." 493 U.S. at 127.

3. The Ninth Circuit's Other Decisions Demonstrate Understanding of the Rule's Mandate.

The Ninth Circuit's failure to heed Rule 38's mandate is a complete puzzlement to Petitioner. Not one but *many* decisions of that court since the 1994 amendment to the Rule have held that a request for sanctions is not properly before the court unless made via separately filed motion. As the Ninth Circuit wrote on March 7, 1996, in denying a request for Rule 38 sanctions:

> Appellees . . . request an award of attorney fees and costs, contending the Gabors' appeal is frivolous. The appellees request these fees only in their appellate briefs and not in a separately filed motion.
>
> The 1994 amendment to Federal Rule of Appellate Procedure 38 permits an award under this rule only "after a separately filed motion or notice from the court and reasonable opppportunity to respond." The advisory committee notes to this amendment state that a request for

> sanctions in a party's appellate brief does not provide sufficient notice to the opposing party.

Gabor v. Frazer, 78 F.3d 459 (9th Cir. 1996).[2]

For other *published* decisions of the Ninth Circuit recognizing this principle, *see In re Del Mission Ltd.*, 98 F.3d 1147, 1154 (9th Cir. 1996) ("A request made in an appellate brief does not satisfy Rule 38"); *In re American Continental Corp.*, 102 F.3d 1524, 1536 n.11 (9th Cir. 1996) (request for sanctions would not be considered unless properly made via separate motion).[3]

---

[2] Petitioners cited *Gabor* to the court below in its motion to vacate the imposition of sanctions. App. 69.

[3] Moreover, there is a veritable multitude of unpublished decisions by the Ninth Circuit, recognizing the proper procedure for imposition of appellate sanctions. *See In re Sovereign Partners*, 110 F.3d 70 (table), 1997 WL 160279, 1997 U.S.App.LEXIS 6598 (9th Cir., April 4, 1997) (citing *In re American Continental Corp.*, 102 F.3d 1524, 1536 n.11 (9th Cir. 1996, noting that "we decline to rule on Circle J's request for sanctions, as it is not properly before us."); *In re Wall*, 108 F.3d 340 (table), 1997 WL 74470, 1997 U.S.App.LEXIS 3139 (9th Cir., February 18, 1997) (request denied without prejudice to party's filing a separate motion for sanctions); *Regal Capital, Inc. v. Valencia*, 106 F.3d 408 (table), 1997 WL 31139, 1997 U.S.App.LEXIS 1105 (9th Cir., January 21, 1997) (request denied without prejudice to party's filing a separate motion for sanctions); *Aguilar v. Sunland Beef Co.*, 89 F.3d 844 (table), 1996 WL 218188, 1996 U.S.App.LEXIS 11049 (9th Cir., April 29, 1996) (noting 1994 amendments to Rule 38); *In re Lund*, 83 F.3d 427 (table), 1996 WL 183658, 1996 U.S.App.LEXIS 9756 (9th Cir., April 12, 1996) (not presented as separate motion; sanctions denied); *Payne v. Exxon Corp.*, 73 F.3d 370 (table), 1995 WL 766016, 1995 U.S.App.LEXIS 38376 (9th Cir., December 29, 1995) (request for sanctions in brief did not comply with Rule 38's 1994 amendments); *Shiloh v. Reader's Digest Ass'n, Inc.*, 62 F.3d

4. Decisions of Other Federal Circuits are Clear that Strict Compliance with Rule 38 is Required.

The Ninth Circuit's decision not only violates Fed. R. App. P. 38 and its own decisions on the matter, but also the decisions of every other United States Court of Appeals which address the correct notice procedure under the Rule as amended. The factor set forth in this Court's Rule 10(a) is thus satisfied.

The decisions of the various Federal Circuits speak with one voice: Rule 38 as amended means what it says.

Second Circuit

In *Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.*, 100 F.3d 942 (table), 1996 WL 20512, 1996 U.S.App.LEXIS 2435 (2d Cir., January 19, 1996), the court stated the obvious: "A statement in a party's brief requesting sanctions is not equivalent to a separately filed motion."

1425 (table), 1995 WL 465774, 1995 U.S.App.LEXIS 22927 (No. 94-56425, August 7, 1995) (denying sanctions where no separate motion filed); *In re Rudnick*, 62 F.3d 1425 (table), 1995 WL 460360, 1995 U.S.App.LEXIS 22469 (9th Cir., August 3, 1995) (30 day show-cause order issued); *In re Allustiarte*, 62 F.3d 1423 (table), 1995 WL 460407, 1995 U.S.App.LEXIS 22468 (9th Cir., August 3, 1995); *Fordjour v. Forties Benefits Insurance Co.*, 57 F.3d 1076 (table), 1995 WL 341562, 1995 U.S.App.LEXIS 14446 (No. 94-16484, June 8, 1995) (refusing to impose sanctions in absence of separately-filed motion, even though court believed that appeal was "wholly without merit").

Sixth Circuit

In *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 181 (6th Cir. 1996) (where parties levelled cross-charges that appeal and cross-appeal were frivolous, court "decline[d] to consider either of these requests as they were not made in a separately filed motion as Rule 38 requires.")

In *Clark v. Central Cartage Co.*, 73 F.3d 361 (table), 1995 WL 758459, 1995 U.S.App.LEXIS 38820 (6th Cir., December 21, 1995), the court dismissed a request for Rule 38 sanctions made in a party's brief, observing that

> Were we otherwise inclined to grant the company's request . . . we could not do so because the company has failed to comply with the procedure set out in the rule, as amended. . . . We DISMISS the appellee's motion for sanctions because it is not properly presented.

See also the very recent decision in *T.G.C. Corp. v. Park*, 1997 WL 234614, 1997 U.S.App.LEXIS 10637 (6th Cir., May 6, 1997), in which the Sixth Circuit stated that "Even if we were to assume that this appeal is frivolous, defendants have failed to comply with the notice requirements of Rule 38."

Seventh Circuit

In *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995), the appellee, like Owens-Illinois herein, requested Rule 38 sanctions in her brief. The Seventh Circuit stated, "We cannot honor such a request". Noting that the amended rule requires a separate motion or notice from the court, the Court held that "Ms. McDonough's brief-borne request is not a separately filed

motion." Accordingly, the Court would "defer final determination" of the sanctions issue until respondent had an opportunity to respond. 48 F.3d at 259.

In *Matter of Bero*, 110 F.3d 462, 466 (7th Cir. 1997), the Seventh Circuit stated that

> Before sanctions can be ordered the rule requires either a separate motion for sanctions or a notice from us that sanctions are in the winds.

Compare Schroeder v. K & K Insurance Group, Inc., 70 F.3d 1274 (table), 1995 WL 687663, 1995 U.S.App.LEXIS 34004 (7th Cir., November 16, 1995) (stating "Appellees' separately filed motion has provided the requisite notice to Schroeder of their request for sanctions").

Federal Circuit

In *Nordberg, Inc. v. Telsmith, Inc.*, 82 F.3d 394 (Fed.Cir.1996), at oral argument, the appellee withdrew its claim that the appeal was frivolous when the court "pointed out that it was substantively and procedurally deficient," noting that Fed. R. App. P. 38 requires separate motion or notice from the court and opportunity to respond.

In short, there are many gray areas in the law. This is most assuredly not one of them. The failure of the court below to afford petitioner an opportunity to demonstrate that the appeal in question was non-frivolous is simply inexplicable, and a summary grant of relief is in order.

C. The Undisputed Failure by the Court of Appeals to Play by Its Own Rules Denied Petitioner Due Process of Law.

The Due Process Clause written into the Constitution's Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . " If due process means anything, it means that a court must play by its own rules. As aptly stated in *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988), "The court wrote its own rules; it must abide by them." Likewise, "attorneys have the right to rely upon the rules. A court cannot ignore and circumvent its rules at will to the detriment of those covered by them." 853 F.2d at 390.

The decisions of this Court are clear that where a provision of law – be it statute, court rule, administrative regulation or legislative procedure – specifies a particular procedure, due process requires that the "process due" is the very process *specified* in that provision of law.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), the petitioner attacked the validity of the Board of Immigration Appeals' denial of his application for suspension of deportation. Accardi claimed that the Attorney General had made a fair hearing of his case impossible by circulating to the Board a list of certain "unsavory characters", including Accardi, whose deportation he desired. This Court, in granting certiorari, noted as the "crucial question"

> whether the alleged conduct of the Attorney General deprived petitioner of any of the rights

> guaranteed him by the statute or by the regulations issued pursuant thereto.

347 U.S. at 265. The Court observed that the regulations, which possessed "the force and effect of law," "prescribe[d] the procedure to be followed in processing an alien's application for suspension of deportation." *Id.* The applicable regulations required that the *Board,* and not the Attorney General, exercise independent discretion to decide such applications. The Court found that the Attorney General's actions amounted to "dictating the Board's decision." 347 U.S. at 267. Since such actions were inconsisent with the "prescribed procedure," the Court set aside the decision below, stating that petitioner was entitled to

> a fair hearing, *which is nothing more than what the regulations accord petitioner as a right.* Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. . . . [A]t least he will have been afforded that due process required by the regulations in such proceedings.

347 U.S. at 268 (both forms of emphasis supplied).

Similarly, in *Yellin v. United States,* 374 U.S. 109 (1963), this Court reversed a contempt conviction based upon a refusal to answer questions before a Congressional committee during a public hearing. Pursuant to one of the committee's own rules (Rule IV), the witness had requested that his testimony be taken in executive session, rather than a public forum. This Court concluded that "the Committee failed to exercise its discretion according to the standards which Yellin had a right to have considered." 374 U.S. at 120. The Court, citing the

Accardi decision, noted that while on remand Yellin might or might not prevail, he was "entitled to have the Committee follow its rules and give him the consideration according to the standards it has adopted in Rule IV." *Id.*

The same principle was well-stated by the Second Circuit in *Montilla v. I.N.S.*, 926 F.2d 162, 164 (2d Cir. 1991), where the court set aside an agency ruling based upon the fact that the tribunal had failed to follow its own rules:

> The notion of fair play animating [the Fifth] amendment precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rulemaker may then with impunity ignore or disregard as it sees fit. The INS may not fairly administer the immigration laws on the notion that on some occasions its rules are made to be broken.

See also Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971) ("rules and regulations must be followed in order to comply with the requirement of basic fairness implicit in the concept of due process of law.")

The late President Richard Nixon was famous for scolding his audiences that he wanted "to make one thing perfectly clear". Rule 38 was and is "perfectly clear": an appellate court may award sanctions for prosecution of a frivolous appeal, but only where there has been either (1) a "separately filed motion"; or (2) "notice from the court and reasonable opportunity to respond." As in *Accardi, supra*, this is the "prescribed procedure," "which is nothing more than what [Rule 38] accord[s] petitioner as a right." As in *Yellin, supra*, the petitioner herein was "entitled to have the [Ninth Circuit Court of Appeals] follow

its rules and give [them] the consideration according to the standards it has adopted in Rule [38]." Because of the clear, undisputed violation of the petitioner's right to rely upon Rule 38's procedural requirements, this Court should grant certiorari and summarily remand back to the Ninth Circuit for petitioner to be afforded a proper opportunity to be heard on the claim of frivolousness.

VIII.

CONCLUSION

There is no dispute that the requisite process due under Federal Rule of Appellate Procedure 38 was never afforded. Petitioner prays that this Court grant summary relief and direct the court below to afford to it the proverbial "day in court" on this matter.

DATED at Detroit, Michigan, this 31st day of May, 1997.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

LEONARD C. JAQUES[4]
Counsel for Petitioner
The Jaques Admiralty Law Firm, P.C.

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[4] Admitted to the Bar of this Court on May 4, 1970.

Norman D. ABAR; Horace J. Abbott; Vance Abel; Clarence Abner; Earl Adams, et al., Plaintiffs-Appellants,

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; Acme Brick Company; Acorn Iron and Supply Co.; Allis-Chalmers Corporation; et al., Defendants-Appellees.

Creighton E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellant.

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; Acme Brick Company; Anchor Packing Co.; Aurora Pump Division of General Signal Corp.; Bethlehem Steel Corporation; Bigelow-Liptak Corporation; Bryan Steam Corp.; Coffin Pump Inc.; Crown, Cork and Seal Co., Inc.; Dana Corp.; Donlee Technologies, Inc.; Durabla Manufacturing Co.; Everlasting Valve Co.; Fel-Pro Incorporated; Fibreboard Corporation; General Cable Co.; B.F. Goodrich; Goodyear Tire & Rubber Co.; Ingersoll-Dresser Pump; John Crane Inc.; Mortell Co.; Owens-Corning Fiberglas Corp.; Owens-Illinois, Inc.; USX Corporation; Warren Pumps, Inc.; Pittsburgh Corning Corporation, Defendants-Appellees.

Nos. 94-55624, 94-55677.

United States Court of Appeals, Ninth Circuit.

Submitted Nov. 17, 1995.*

Decided April 16, 1996.

Appeal from the United States District Court Southern District of California, Nos. CV-93-01120-JSR, CV-93-01119-JSR; John S. Rhoades, District Judge, Presiding.

S.D.Cal.

AFFIRMED.

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,** District Judge.

MEMORANDUM***

The plaintiff mariners in the above cases filed two identical complaints on July 27, 1993 alleging injuries stemming from asbestos exposure. In Miller, an administrator of the estates of 370 decedents brought suit against 93 defendants involved in some phase of the production of either asbestos or products containing asbestos. In Abar, 994 plaintiffs brought suit against the same 93 defendants.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

** Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

In 1991, the United States District Court for the Eastern District of Pennsylvania removed the maritime claims from the Multidistrict Litigation ("MDL") asbestos docket and created a separate maritime asbestos docket. The court appointed Leonard C. Jaques, plaintiffs' counsel in the instant cases, as "lead and liaison counsel" of all maritime asbestos claims. Defendants note that during the same week in July of 1993 in which the Miller and Abar claims were filed, plaintiffs' counsel filed identical complaints in five other federal district courts on behalf of 5000 additional claimants. Prior to the dismissal of the Abar and Miller complaints, the Judicial Panel on Multidistrict Litigation issued a conditional transfer of Abar and Miller to the Eastern District of Pennsylvania. In response to the dismissal, the Panel vacated its order.

The Abar and Miller complaints asserted admiralty and diversity jurisdiction. On appeal, plaintiffs only assert admiralty jurisdiction. The complaints allege that the defendants:

> designed, manufactured, sold or otherwise supplied for use of shipowners aboard vessels harmful toxins and carcinogens including asbestos and asbestos-containing products or machinery and equipment on which the asbestos products were placed . . . on vessels upon which Plaintiffs or Plaintiff's [sic] Decedents served during periods of time when the respective mariners as crewmen were exposed to their detriment to the afore-stated chemicals and products, suffering injury to their person or death of their being as the case may have resulted.

The complaints do not further specify any time or place for the injuries or any connection between specific plaintiffs and specific defendants.

Defendants brought motions to dismiss and the district court concluded that the plaintiffs were improperly joined and dropped all but the first named plaintiff in each complaint, and then dismissed the complaints for failure to comply with the pleading requirements of Fed.R.Civ.P. 8(a). The court found that the plaintiffs 1) failed to provide enough specific details to establish admiralty jurisdiction and 2) failed to provide enough specific details to comply with the requirements of Rule 8(a)(2). The court granted the motions to dismiss both complaints on January 18, 1994 and on January 21, 1994 issued an order to dismiss with leave to amend. Rather than file amended or separate complaints, plaintiffs filed motions for relief from the judgment of dismissal pursuant to Rule 60(b)(6). The district court's denials of the Miller and Abar motions were entered on March 18 and 21, 1994, respectively. Plaintiffs filed notices of appeal on April 14 in Miller and April 15 in Abar. In response to defendants' arguments that their notices were untimely, plaintiffs maintained that they were only appealing the denial of the motions for relief.

Review of motions for relief pursuant to Rule 60(b) "does not bring up the underlying judgment for review; we review only for abuse of discretion." Cel-A-Pak v. California Agric. Labor Relations Bd., 680 F.2d 664, 668 (9th Cir.1982). Relief under Rule 60(b) is only available when "extraordinary circumstances prevented a litigant from seeking earlier, more timely relief . . . circumstances beyond its control. . . . " United States v. Alpine Land &

Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). See also In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir.1989) (relief appropriate where party had "no opportunity to follow normal paths of appeal" because legislation passed after the judgment was the ground for appeal). A moving party must do more than simply repeat its legal arguments. Blair v. Shanahan, 38 F.3d 1514, 1518 (9th Cir.1994), cert. denied, 115 S.Ct. 1698 (1995).

Plaintiffs argue that the motion for relief should have been granted because joinder of the plaintiffs was appropriate and their pleadings were sufficient to comply with Rule 8. Plaintiffs, however, fail to demonstrate any extraordinary circumstance which prevented them from filing a direct appeal. Their reference to a statute of limitations problem is insufficient as any timeliness bar was not the result of circumstances beyond plaintiffs' control. See Alpine, 984 F.2d at 1049. Thus we decline to consider the merits of the district court's rulings on joinder and specificity.

Plaintiffs also argue that the district court should have allowed removal to the Northern District of Ohio where, according to plaintiffs' attorney, all Abar plaintiffs have a "separate and independent cause of action" and 108 of the Miller plaintiffs have pending wrongful death actions. They appear to argue that even if this Court agrees that its claims should have been dismissed, it should instead order their transfer to the Northern District of Ohio. 28 U.S.C. 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to the district or division where it might have been brought.

The decision to transfer under Section 1404(a) is within the discretion of the district court. Arley v. Union Pacific Ins. Co., 379 F.2d 183, 189 (9th Cir.1967), cert. denied, 390 U.S. 950 (1968).

The district court did not abuse its discretion in refusing to grant the request for transfer. As noted by the district court, in view of the dismissal, there are no civil actions left to transfer. Furthermore, transferring a complaint which should be dismissed achieves neither the convenience nor the justice contemplated by Section 1404(a).

Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. Hatch v. Reliance Ins. Co., 758 F.2d 409, 416 (9th Cir.1985) (sanctions need not be sought to be awarded), cert. denied, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs-Appellees, vs. ACandS, INC., et al., Defendant-Appellant.	No. 94-55624 DC# CV-93-1120-JSR Southern California
CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellee, vs. ACandS, INC., et al., Defendants-Appellants.	No. 94-55677 DC# CV-93-1119-JSR Southern California ORDER (Filed Mar. 6, 1997)

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,*

The court has received Plaintiffs/Appellants' Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs. The Appellate Commissioner has reviewed the motion for reconsideration and is not inclined to grant reconsideration. The motion for reconsideration has

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* Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

therefore been referred to this panel, which hereby denies the motion for reconsideration.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

Before: Peter L. Shaw, Appellate Commissioner

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

PLAINTIFFS/APPELLANTS' MOTION FOR RECONSIDERATION OF PORTIONS OF THE APPELLATE COMMISSIONER'S ORDER GRANTING ATTORNEYS' FEES AND DOUBLE COSTS

(Filed Sep. 30, 1996)

NOW COMES ALAN KELLMAN, counsel for the Plaintiffs/Appellants, by and through **THE MARITIME ASBESTOSIS LEGAL CLINIC,** a division of **THE JAQUES ADMIRALTY LAW FIRM, P.C.,** and pursuant to

9th Cir. R. 39-1.5, hereby seeks reconsideration of the Appellate Commissioner's Order filed September 16, 1996, granting attorneys' fees and double costs pursuant to this Court's award in its Memorandum of April 19, 1996, of sanctions for filing a frivolous appeal. Since the Commissioner's Order was mailed to Plaintiff's counsel on September 16, 1996, under Fed. R. App. P. 26(c), this motion for reconsideration is timely. In support, Plaintiffs/Appellants rely on the attached brief.

DATED at Detroit, Michigan this 27th day of September, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

Before: Peter L. Shaw, Appellate Commissioner

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

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Defendants-Appellees.

No. 94-55624
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v.

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Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

PLAINTIFFS/APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF PORTIONS OF THE APPELLATE COMMISSIONER'S ORDER GRANTING ATTORNEYS' FEES AND DOUBLE COSTS

In support of their Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs, Plaintiffs/Appellants take the following exceptions:

(1) In the Appellate Commissioner's Order, an award of attorneys' fees and costs is made to Defendants/Appellees Anchor Packing Co. and Coltec Industries, Inc. despite the fact that their Application for Attorney Fees and Sanctions was inexplicably not properly served on Plaintiffs/Appellants' counsel. As set forth in Plaintiffs/Appellants' Motion to Strike Responses, Replies, and Declarations Filed by Defendants/Appellees Aurora Pump, Inc., The Mortell Company, Quaker Construction Products, Inc., Fel-Pro Incorporated and Felt Products Manufacturing Company, Inc., and Coltec Industries, Inc., and Anchor Packing Company to Plaintiffs/Appellants' Response and Objections to Application for Attorney's Fees and Double Costs, Plaintiffs/Appellants never received the Application for Attorney Fees and Sanctions. In support of their Motion, Plaintiffs/Appellants submitted an Affidavit of Counsel establishing that the Application was not received by their counsel. Accordingly, Plaintiffs/Appellants take exception with the Appellate Commissioner's ruling that these defendants are entitled to attorneys' fees and costs. When Plaintiffs/Appellants did not receive the Application for Attorney Fees and Sanctions, they were denied the opportunity to object to the Application. Under these circumstances, the Appellate Commissioner should have either stricken the Application by Coltec Industries and Anchor Packing, which was not properly served on Plaintiffs/Appellants, or afforded Plaintiffs/Appellants an

opportunity to file objections. *Cf. DeVore v. Federal Savings Bank of Dover, N.H.*, 818 F. Supp. 432 (D. Me. 1993), *aff'd*, 14 F.3d 44 (1st Cir. 1994) (table) (motion for summary judgment ordered reserved when confusion existed over whether plaintiffs had been served).

(2) The Appellate Commissioner awarded attorneys' fees and costs pursuant to this Court's award of sanctions for a frivolous appeal to two Defendants/Appellees who did not file an appearance in these consolidated appeals. Order at 14. One of these Defendants/Appellees, Home Rubber Co., sought only attorneys' fees. The other, Indian Head Industries, asked for both attorneys' fees and double costs. Plaintiffs/Appellants take exception with the Appellate Commissioner's award to these parties. Under Fed. R. App. P. 38, when a court determines that an appeal is frivolous, "it may . . . award *just* damages and single or double costs." Case law has also established that an award of sanctions for needless costs should not be made. *Brooks v. Allison Div., General Motors Corp.*, 874 F.2d 489 (7th Cir. 1989). Where a party has never filed anything in an appellate proceeding, including a simple appearance form, it has done no work in the appellate court. A sanctions award to such a party allows them to reap where they have not sown, in derogation of the Rule 38 mandate that claimed damages and costs be just.

(3) In his Order, the Appellate Commissioner awarded attorneys' fees to Defendant/Appellee Warren Pumps, Inc. However, the Order misstates one basis for Plaintiffs/Appellants' Objections to Warren Pumps' Application for Attorneys Fees. The Commissioner recites that Plaintiffs' counsel objected to "an excessive hourly

fee." Order at 22. In fact, Plaintiffs' counsel objected to the claimed attorneys' fees because Warren Pump's counsel utilized a uniform rate of $165.00 per hour for all attorneys in its office. *See* Exhibit D to Plaintiffs/Appellants' Response and Objections. As discussed in James W. Moore, *Moore's Federal Practice* ¶ 54.79[1] (1996), the determination of a reasonable attorneys' fee is in part based upon the appropriate hourly rate. Such an appropriate hourly rate is reached by determining either the historic rate for each individual attorney or the community rate for a lawyer with the same level of experience, reputation, and skill. *Id.* at ¶ 54.79[1-2]. Individual assessment of each attorney's hourly rate is warranted under Supreme Court precedent. As noted by the Supreme Court,

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively – even within a law firm.

Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 1547 n. 11, 79 L. Ed. 2d 891 (1984).

The use of a uniform hourly rate for all attorneys in a law firm undercuts the Court's ability to determine the reasonableness of the attorneys' fees that are sought, and it assumes the attorneys of varied skill levels are equal when they are not. Thus, the seminal case of *In re Fine*

Paper Antitrust Litigation, 751 F.2d 562 (11th Cir. 1984), required *individual* determinations of reasonable billing rates. *Id.* at 590-91. Plaintiffs/Appellants except to the Appellate Commissioner's Order inasmuch as it awards attorneys' fees to Defendant/Appellee Warren Pumps based on a uniform hourly rate for all attorneys in the law firm providing representation.

(4) Plaintiffs/Appellants except to the Appellate Commissioner's award of attorneys' fees even though most of the Applications for Attorneys' Fees submitted do not contain detailed itemization of the fees requested. This argument was raised before the Appellate Commissioner, *see* Exhibit D to Plaintiffs/Appellants' Response and Objections. Plaintiffs/Appellants reiterate that, in the absence of a properly detailed application for attorneys' fees or billing records, it is impossible for Plaintiffs/Appellants' counsel to make any adequate determination of whether the charges asserted by the various Defendants/Appellees are excessive, duplicative, or reflect overstaffing. For example, in Warren Pump's Application for Attorneys Fees, the hours claimed for preparing the appellate briefs include everything from the reviewing of Plaintiffs/Appellants' Opening Brief and legal research down to compiling the Record Excerpts. No allocation of hours is given to each activity, making it impossible for Plaintiffs/Appellants to determine whether a reasonable amount of time was spent on each activity. And, in Aurora Pump's Application for Attorneys' Fees, the supporting Declaration only recites that a certain number of attorney hours were spent without giving any detail as to what those hours were spent doing. With this paucity of detail, the reasonableness of the fees claimed cannot be

meaningfully determined. These Applications do not reflect the sort of "billing sense" that an attorney uses when dealing with a private client, as they must under Supreme Court precedent. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983). Because there are similar problems with the Applications for Attorneys' Fees submitted by certain other Defendants/Appellees, as set forth in Exhibit D to Plaintiffs/Appellants' Response and Objections, Plaintiffs/Appellants except to the Appellate Commissioner's Order on this ground as well.

For the reasons set forth above, Plaintiffs/Appellants ask that this Court reconsider those portions of the Appellate Commissioner's Order to which they have noted exceptions.

DATED at Detroit, Michigan this 27th day of September, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

CERTIFICATE OF SERVICE

I certify that on September 27, 1996 I served a copy of *Plaintiffs/Appellants' Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs* by regular U.S. mail to each of the counsel of record on the attached sheet.

/s/ Michael Skinner
Michael Skinner

Subscribed and sworn to before
me this 27th day of September, 1996.

/s/ Lynn Rademacher
Notary Public

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs/Appellants, vs. ACandS, INC., et al., Defendants/Appellees.	No. 94-55624 DC# CV-93-1120-JSR Southern California
CREIGHTON S. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiffs/Appellants, vs. ACandS, INC., et al., Defendants/Appellees.	No. 94-55677 DC# CV-93-1119-JSR Southern California ORDER (Filed Sep. 16, 1996)

Before: Peter L. Shaw, Appellate Commissioner

The Court awarded to all defendants sanctions against plaintiffs' counsel in the form of attorneys' fees and double costs for filing frivolous appeals. The court directed the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant. The Appellate Commissioner issued an order directing defendants to submit applications for attorneys' fees and double costs.

Many defendants submitted applications for fees and double costs. Plaintiffs' counsel filed a response and

opposition. Several defendants filed replies to the opposition.[1] The Appellate Commissioner has reviewed the filings and makes the following factual and legal determinations.

I

General Findings

A. Principles Governing Award of Attorneys' Fees

Defendants are entitled to reasonable attorneys' fees for defending against this appeal. A reasonable fee is calculated by determining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The reasonableness determination results from applying the criteria identified in *Hensley*, which include the time and labor required, the novelty and difficulty of the questions, the skill needed to perform the legal service properly, the amount involved, and the results obtained. *Id.* at 430 n.3. Any hours that are excessive should be excluded. *Id.* at 434. The rate to be used is the prevailing market rate charged for similar services by lawyers of reasonably comparable skill, experience, and

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[1] Plaintiffs' counsel has moved to strike the replies on the grounds that neither the Federal Rules of Appellate Procedure nor the Ninth Circuit Rules envision the filing of replies, and that the replies are untimely because they were filed more than seven days after the opposition. The Appellate Commissioner declines to rule on the motion to strike because nothing in any of the reply briefs has influenced the award of fees or costs.

reputation. *See Blum v. Stenson*, 465 U.S. 886, 895-96 & n.11 (1984).

Plaintiffs' counsel makes a number of general objections to the defendants' claims. Plaintiffs' counsel objects to excessive hours, lack of specific itemization of hours, and excessive hourly rates charged. Plaintiffs' counsel also objects to fees claimed for services by paralegals and law clerks.

Plaintiffs' counsel asserts that several parties claim excessive fees in light of the fact that they filed no brief or, in some cases, filed only a motion for joinder. Although the nature of the documents filed by a party is relevant in assessing the reasonableness of the number of hours claims, a fee request is not necessarily excessive merely because a party filed no documents. In a multi-party case, even a party that does not file its own brief may reasonably need to stay informed about the case, coordinate the briefing effort with other parties, and determine whether to file a notice of joinder. Where that is the case, reasonable fees will be awarded.

Plaintiffs' counsel repeatedly objects to defendants' failure to supply a more detailed itemization of fees requested. Where a claimant fails to show the hours, rate per hour, and type of work performed, the court may, of course, reduce the fee request. Except as otherwise noted below, however, the defendants supported the fee requests with sufficient detail to permit an informed determination whether the amounts claimed are reasonable.

Plaintiffs' counsel objects to fees claimed in preparing the fee application. This objection has merit. Costs

and fees incurred in computing the appropriate amount of sanctions are not recoverable. *See Lyddon v. Geothermal Properties, Inc.*, 996 F.2d 212, 214 (9th Cir. 1993).

Plaintiffs' counsel objects to the request for fees for paralegals and law clerks. This objection lacks merit and reasonable time claimed will be awarded. *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989).

The hourly rate claimed by defendants will be awarded if the defendants show that an attorney's experience, usual and customary rate, or the prevailing charges for similar work in that area justifies that rate. *See Blum v. Stenson*, 465 U.S. at 895 & n.11. Where no such justification is shown, the rate will be adjusted.

B. Costs

Defendants' request for costs is governed by Ninth Circuit Rule 39-1.2, which provides that "costs will be allowed for 18 copies of each brief plus 2 copies for each party to be served [and] . . . six copies of the excerpts of record plus 1 copy for each party to be served."

Plaintiffs' counsel suggests that several briefs could have been consolidated and objects to the additional copying charges associated with the additional briefs. Plaintiffs' counsel also objects to charges for postage, express mail, long distance phone calls, mileage, excessive copy rates, excessive numbers of briefs, and duplication of excerpts of record.

The defendants were not obligated to file consolidated briefs, and therefore all defendants who filed briefs are entitled to copying costs. The assertion that copies

should be determined by the number of attorneys – as opposed to the number of parties – ignores the explicit language of Ninth Circuit Rule 39-1.2. All parties were entitled to receive copies of briefs, and plaintiffs' counsel has advanced no justification for shifting the burden of copying to the receiving attorneys.

Charges for postage, express mail, phone calls, mileage, and copy charges exceeding 20 cents per page are not authorized by Ninth Circuit Rule 39-1 and cannot be awarded.

C. Parties Entitled to Fees and Costs

Plaintiffs' counsel asserts that parties not listed on the Ninth Circuit's docket have no right to collect fees and costs.[2] This assertion lacks merit. First, some of the parties listed by plaintiffs' counsel *are* on the court's docket sheet. Second, all of these parties are listed on the district court docket sheet, and the court has not issued any orders removing any of the parties. Third, these parties are listed on plaintiffs' counsel's proof of service list, which demonstrates that plaintiffs' counsel believed them to be parties to the appeal. Finally, this court awarded fees and double costs to all "defendants," and

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[2] Specifically, plaintiffs' counsel objects to any award to: Argo International Corp., Auburn Mfg. Co., Gatke Corp., Home Rubber Co., Indian Head Indus., Inc., James Walker Mfg. Co., Norton Co., The Okonite Co., Pecora Chemical Corp., Phoenix Specialty Mfg. Co., Plibrico Co., Quaker Construction Products Co., Resco Products, Inc., Rhopac Inc., Vellumoid Inc., Viking Pump, Inc., Sherwin-Williams Co., and Zimmerman Packing & Mfg. Co.

defendants in the district court action had a legitimate right to defend the judgment; a favorable outcome for plaintiffs' counsel in this court could have affected all defendants in the district court.

D. Fee Requests by Attorney J. Lawrence Judy

Attorney J. Lawrence Judy submitted separate fee applications on behalf of himself and colleagues for the following defendants: Alfred Conhagen, Inc., Coffin Pump, Inc., Elliot Company, Excelsior, Inc., Greene Tweed Company, Norton Company, Plibrico Company, Sherwin-Williams Company, Vellumoid, Inc., and Viking Pump, Inc. The total fee request is $21,944.50.

Plaintiffs' counsel objects to the lack of detail in these declarations, and suggests that counsel Judy may have billed several clients for the same work, but offers no evidence to support this conjecture. Therefore, to the extent that plaintiffs' counsel requests this court to apply a higher standard for determining the accuracy of hours claimed by attorney Judy, the request is rejected.

Nevertheless, the cumulative claimed fees for attorney Judy's work appears excessive. None of the defendants he represented filed any independent substantive documents with the court, the work was not complex, and significant efficiencies should have been achieved in representing so many clients with identical or similar issues. Therefore, the claims for attorneys fees submitted by attorney Judy have been reduced by half. All claimed costs are justified, however, and are awarded in full.

E. Contributions to Arent & Fox

The law firm of Arent & Fox represented Fel-Pro, Inc. and also prepared certain primary documents with which many other codefendants joined. As part of a joint defense strategy, 17 codefendants each contributed $500.00 to Arent & Fox, which reasonably allocated half to costs and half to fees.

Each of the 17 contributing codefendants is entitled to double costs. Thus, those codefendants will receive a total of $8,500.00. Fel-Pro reports actual costs of only $4,005.60, however, and is entitled to double costs of only $8,011.20. Thus, the award to Fel-Pro shall be reduced by the $488.80 overcharge.

Fel-Pro claims attorney fees of $70,071.81. Its application requests $65,821.81, which reflects the deduction of the $4,250.00 contributed by codefendants. The impact of these findings on the fees awarded to Fel-Pro, Inc. are discussed in greater detail in the appropriate section of part II.

II

Specific Awards

ACandS, Inc., et al.

These defendants filed two nearly identical 8-page briefs and 47-page supplemental excerpts of record. They request $44,450.50 in fees and double costs in the amount of $3,278.72 for copying costs. Plaintiffs' counsel objects to excessive hours and lack of itemization. A careful review of the fees requested reveals that the amounts

claimed are excessive. The questions addressed are not difficult, and the work produced does not justify the amount of time spent. Therefore, fees are awarded in the reduced amount of $15,000.00. Double costs in the amount of $3,278.72 are awarded in full.

Alfred Conhagen, Inc.

This defendant did not file any independent substantive documents with the court, and requests $1,200.00 in fees. Plaintiffs' counsel objects to the lack of a fee itemization and possibly duplicative fees. The court finds the fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $600.00 are awarded.

Anchor Packing Co. & Coltec Indus.

These defendants did not file any independent substantive documents with the court, and request $6,192.50 for fees and $1,000.00 for double costs, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel incorrectly asserts that these defendants did not submit a motion for fees and double costs, and also objects to excessive hours. The hours claimed are not justified by the need to keep informed about the appeal and coordinate with other parties. Accordingly, fees are reduced to $4,192.50. Double costs in the amount of $500.00 are awarded.

Aurora Pump Division of General Signal Corp.

This defendant did not file any independent substantive documents with the court, and requests $3,882.24 in fees and double costs in the amount of $423.24. Plaintiffs' counsel objects to excessive attorney's fees and lack of itemization. The fee application is sufficiently detailed, however, and the amount claimed is reasonable. Fees are awarded in the amount of $3,882.24. The defendant failed to separate nonreimbursable costs for postage and phone calls from allowable copy costs. Therefore, costs are reduced by half and $211.62 is awarded.

B.F. Goodrich

This defendant did not file any independent substantive documents with the court, and requests $20,515.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of specific itemization of hours, mathematical errors, and paralegal time claimed for preparation of application for fees. As discussed in the General Findings, fees claimed for the preparation of the fee application are not recoverable. Therefore, the fee request is reduced by $1,265.50. Furthermore, the hours claimed are excessive and fees are reduced by half after deducting the above amount. Defendant is awarded $4,625.00 in fees and $500.00 in double costs.

Champion International

This defendant did not file any independent substantive documents with the court, and requests $1,690.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the $240.00 per hour fee rate as excessive. Because the defendant fails to demonstrate the reasonableness of the fee rate, fees are reduced by $40 per hour and are awarded in the amount of $1,450.00. costs of $500.00 are also awarded.

Coffin Turbo Pump, Inc.

This defendant did not file any independent substantive documents with the court, and requests $12,497.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours and possibly duplicative fees. The hours spent are excessive and the fee request is reduced by half to $6,248.75. Additionally, in accordance with part D of the General Findings, that portion of fees attributed to attorney Judy ($4,287.50) is reduced by half again. Fees in the amount of $5,177.00 are awarded. Double costs of $500.00 are also awarded.

Durabla Manufacturing Co.

This defendant filed a 2-page motion for joinder, and requests $514.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and

$250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to a lack of itemization. The fee request is, however, sufficiently detailed and fees are awarded in the amount of $514.00. Double costs of $500.00 are also awarded.

Elliot Co.

This defendant did not file any independent substantive documents with the court, and requests $475.00 in fees. Plaintiffs' counsel objects to a lack of fee itemization and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $237.50 are awarded.

Everlasting Valve Co.

This defendant did not file any independent substantive documents with the court, and requests $3,045.00 in fees and double costs in the amount of $266.48. Plaintiffs' counsel objects to excessive hours, lack of itemization, and costs for express mail and mileage. The fee request is sufficiently detailed and justified to keep abreast of the case. Fees in the amount of $3,045.00 are awarded. All costs are denied as noncompensable. *See* 9th Cir. R. 39-1.2.

Excelsior Inc.

This defendant did not file any independent substantive documents with the court, and requests $1,612.50 in

fees. Plaintiffs' counsel objects to excessive hours. The fee request is reduced by half in accordance with part D of the General Findings. Fees in the amount of $806.25 are awarded.

Fel-Pro Inc. & Felt Products Mfg. Co.

These defendants filed a 35-page brief, a 77-page supplemental excerpts of record, and a motion to dismiss the appeal. They request $65,821.81 in fees and double costs in the amount of $3,761.20. Plaintiffs' counsel objects to excessive hours, lack of itemization, excessive hourly fee, incorporation of computer research time into fees, and failure to fully deduct contributions from other defendants.

As discussed in part E of the General Findings, the cost claimed by Arent & Fox have been paid by the codefendants and no costs will be awarded to Fel-Pro, Inc. Furthermore, the double costs overcharge of $488.80 will be deducted from the award to Fel-Pro, Inc.

The maximum claimed attorney fee of $200.00 per hour is not excessive and no adjustment will be made.

It is reasonable to assume that the amount of time an attorney saves using a computer research service more than compensates for the costs of that service. To disallow computer research costs would encourage attorneys to use a less efficient manual method of research. Therefore, computer research costs in the amount of $2,551.56 are awarded as part of compensable attorneys' fees. *See Lyddon*, 996 F.2d at 215. *Accord Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991).

A careful review of the total fees requested reveals that the amounts claimed are excessive. Although Arent & Fox played an important role in coordinating the efforts of many defendants, the legal issues are not complex and the work produced does not justify the amount of time claimed. Therefore, after deducting the $488.80 overcharge, the remaining fee request is reduced by one-third. Accordingly, fees in the amount of $43,555.00 are awarded and no further costs are awarded.

Flintkote Co.

On May 21, 1996 this defendant filed a motion to withdraw its application for fees. The motion is granted and no fees or costs are awarded.

General Cable Co.

This defendant did not file any independent substantive documents with the court, and contributed $250.00 for fees and $250.00 for costs to Arent & Fox. Fees in the amount of $250.00 and costs in the amount of $500.00 are awarded.

Goodyear Tire & Rubber Co.

This defendant did not file any independent substantive documents with the court, and requests $1,087.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of

itemization of hours and an excessive number of hours. The fee request is sufficiently detailed and the number of hours claimed is justified to keep abreast of the case. Fees in the amount of $1,087.50 are awarded. Costs of $500.00 are also awarded.

Greene Tweed Co.

This defendant did not file any independent substantive documents with the court, and requests $737.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, however, and the $250.00 paid to Arent & Fox is awarded in full. But the remaining fees attributed to attorney Judy ($487.50) are reduced by half in accordance with part D of the General Findings. Fees in the amount of $493.75 and double costs in the amount of $500.00 are awarded.

The Home Rubber Co.

This defendant did not file any independent substantive documents with the court, and requests $844.50 in fees. Plaintiffs' counsel objects to this request because Home Rubber did not file an appearance, the application lacks a specific itemization of hours, and the application seeks fees for preparing the attorney's fees claim. The fee request is sufficiently detailed and the number of hours spent appears justified to keep abreast of the case. As discussed in the General Findings, however, the time

spent on preparing the fee application is not recoverable and has been deducted. Fees in the amount of $672.00 are awarded.

Indian Head Industries, Inc.

This defendant did not file any independent substantive documents with the court, and requests $628.00 in fees and double costs in the amount of $752.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to a request from a party that did not file an appearance, lack of itemization of hours, and mathematical errors.

The fee request is sufficiently detailed and is justified in order to keep abreast of the case. Fees in the amount of $628.00 are awarded. Part of the requested double costs is for copies made at the rate of 25 cents per page. This amount is reduced to reflect a copy rate of 20 cents per page and costs are awarded in the amount of $701.60.

Ingersoll-Dresser Pump Company

This defendant did not file any independent substantive documents with the court, and requests $1,650.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, and doubling of attorney's fees. The requested fees apparently do include a doubling of the $250.00 contributed to Arent & Fox, and the request is therefore reduced by $250.00. The remaining fee request is sufficiently detailed and the hours are

justified to keep abreast of the case. Therefore, fees in the amount of $1,400.00 and double costs in the amount of $500.00 are awarded.

James Walker Mfg. Co.

This defendant did not file any independent substantive documents with the court, and requests $1,413.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, and paralegal charges. The fee request is sufficiently detailed and the hours claimed are justified in order to keep abreast of the case. Fees in the amount of $1,413.00 and double costs in the amount of $500.00 are awarded.

Mortell Co.

This defendant filed motions for joinder in each appeal, and requests $1,188.50 in fees and double costs in the amount of $832.00. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, and an excessive number of copies.

The fee request is sufficiently detailed and reflects a reasonable amount of time to stay abreast of the case. Therefore, fees in the amount of $1,188.50 and double costs in the amount of $832.00 are awarded.

Norton Co.

This defendant did not file any independent substantive documents with the court, and requests $922.00 in

fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours, and possibly duplicative fees. The fee request is sufficiently detailed and the $250.00 paid to Arent & Fox is awarded in full, but the remaining fees, attributed to attorney Judy ($672.00), are reduced by half in accordance with part D of the General Findings. Fees in the amount of $586.00 and double costs in the amount of $500.00 are awarded.

The Okonite Co.

This defendant did not file any independent substantive documents with the court, and requests $628.00 in fees and double costs in the amount of $752.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours and mathematical errors. The fee request is sufficiently detailed and justified in order to keep abreast of the case. The court therefore awards fees in the amount of $628.00. Part of the requested double costs is for copies made at the rate of 25 cents per page. This amount is reduced to reflect a copy rate of 20 cents per page, and double costs are awarded in the amount of $701.60.

Owens-Corning Fiberglass Corp.

This defendant filed a 1-page motion for joinder, and requests $1,260.00 in fees and double costs in the amount

of $197.28. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, and failure to break down costs or use a Ninth Circuit bill of costs form. The defendant's application provides almost no detail about fees and an incomplete itemization of costs, including an unknown amount of non-allowable charges for postage. Therefore, fees and double costs are reduced by half. Appellee is awarded $630.00 in fees and $98.64 in costs.

Owens-Illinois, Inc.

This defendant filed a 19-page brief and two supplemental excerpts of record totaling 332 pages, and requests $13,043.67 in fees and double costs in the amount of $4,164.80 for copying costs. Plaintiffs' counsel objects to an excessive hourly rate, lack of itemization, excessive hours and fees for paralegals and legal assistants, and an excessive number of copies. A careful review of the fees requested reveals that the amounts claimed are justified. Therefore, fees in the amount of $13,043.67 and double costs in the amount of $4,164.80 are awarded in full.

PPG Indus., Inc.

This defendant filed a 1-page motion for joinder, and requests $3,540.00 in fees and double costs in the amount of $1,845.98. Plaintiffs' counsel objects to the lack of itemization of hours, excessive hours, misallocation of fees contributed to Arent & Fox, lack of itemization for costs, and an unknown charge for postage.

The defendant should have allocated half of the $500.00 contributed to Arent & Fox as costs and half as

fees. However, defendant treated the entire amount as costs. Therefore, the fee request is amended to include $250.00 for Arent & Fox and the request for double costs is reduced by $500.00.

The fee request is sufficiently detailed and reflects a reasonable amount of time to stay abreast of the case. Therefore, fees of $3,790.00 are awarded. Appellee provides no detail for costs. Therefore, costs are reduced by half and costs in the amount of $672.99 are awarded.

Pittsburgh Corning Corp.

This defendant filed a 2-page motion for joinder, and requests fees in the amount of $12,225.00 and double costs in the amount of $438.40. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, charges for paralegals, and failure to break down costs or use a Ninth Circuit bill of costs form.

The defendant's declaration in support of attorney's fees is inadequate and the amount claimed is excessive. Accordingly, fees are reduced to $4,000.00. Appellee failed a bill of costs form on April 30, 1996 that adequately explains copy costs. Double costs in the amount of $438.40 are therefore awarded.

Plibrico Co.

This defendant did not file any independent substantive documents with the court, and requests $1,362.50 in fees. Plaintiffs' counsel object to the lack of itemization of

hours and possibly duplicative fees. The request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $681.25 are awarded.

Quaker Construction Products Co.

The California office representing this defendant did not file any independent substantive documents with the court, and requests $1,778.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, doubling of attorneys fees paid to Arent & Fox, lack of itemization of hours, and fees for paralegals.

This defendant miscalculated the fees; the correct total should be $1,528.00. The remaining fee request is sufficiently detailed and is justified to keep abreast of the case. Fees in the amount of $1,528.00 and double costs in the amount of $500.00 are awarded.

The Detroit office representing this defendant also did not file any independent substantive documents with the court, and requests $693.00 for attorney's fees and $17.40 for double costs. Plaintiffs' counsel objects to an excessive hourly fee, lack of itemization of hours, and charges for express mail. The court finds the fee request is sufficiently detailed. However, the hourly rate of $210.00 is reduced to $200.00 Therefore, fees are awarded in the amount of $662.00. The costs – for air express charges – are nonreimbursable and are denied.

Sherwin-Williams Co.

This defendant did not file any independent substantive documents with the court, and requests $2,125.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, possibly duplicative fees, and lack of itemization of hours. The fee request is sufficiently detailed and not excessive and the $250.00 paid to Arent & Fox is awarded in full. But the remaining fees, attributed to attorney Judy ($1,875.00), are reduced by half in accordance with part D of the General Findings. Therefore, fees in the amount of $1,187.50 and double costs in the amount of $500.00 are awarded.

USX Corp.

This defendant did not file any independent substantive documents with the court, and requests $5,039.51 in fees and double costs in the amount of $572.22, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, inclusion of costs for the preparation of the fee application, and failure to itemize copy and postage costs.

As discussed in the General Findings, fees claimed for the preparation of the fee application are not recoverable. Therefore, the fee request is reduced by $843.75. The remainder of the fee request is sufficiently detailed and not excessive. Therefore, fees in the amount of $4,195.76 are awarded.

It is impossible to tell from appellee's bill of costs what portion of the amount above that paid to Arent & Fox is for allowable copy costs and what amount is for non-allowable postage. Therefore, that amount above the $250.00 paid to Arent & Fox is reduced by half. Double costs in the amount of $536.11 is awarded.

Vellumoid, Inc.

This defendant did not file any independent substantive documents with the court, and requests fees in the amount of $437.50. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $218.75 are awarded.

Viking Pump, Inc.

This defendant did not file any independent substantive documents with the court, and requests fees in the amount of $575.00. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $287.50 are awarded.

Warren Pumps, Inc.

This defendant filed a 17-page brief and a 108-page supplemental excerpts of record, and requests $11,991.50 in fees and double costs in the amount of $6,640.80.

Plaintiffs' counsel objects to excessive hours, lack of itemization, and an excessive hourly fee. The amount of detail is sufficient and the hours requested and hourly fee are justified. Therefore, the court awards attorney's fees in the amount of $11,991.50 and double costs in the amount of $6,640.80.

III

Conclusion

In accordance with the foregoing determinations, it is hereby ordered that plaintiffs' counsel shall pay to defendants the following amounts:

Party	Fees	Doubled Costs	Total
ACandS, Inc., et al.	$15,000.00	$ 3,278.72	$18,278.72
Alfred Conhagen, Inc.	600.00	0.00	600.00
Anchor Packing & Coltec	4,192.50	500.00	4,692.00
Aurora Pump	3,882.24	211.62	4,093.86
B.F. Goodrich	4,625.00	500.00	5,125.00
Champion International	1,450.00	500.00	1,950.00
Coffin Turbo Pump, Inc.	5,177.00	500.00	5,677.00
Durabla Manufacturing	514.00	500.00	1,014.00
Elliot Co.	237.50	0.00	237.50
Everlasting Valve Co.	3,045.00	0.00	3,045.00
Excelsior Inc.	806.25	0.00	806.25
Fel-Pro Inc.	43,555.00	0.00	43,555.00
Flintkote Co.	0.00	0.00	0.00
General Cable Co.	250.00	500.00	750.00

Goodyear Tire & Rubber	1,087.50	500.00	1,587.50
Greene Tweed Co.	493.75	500.00	993.75
The Home Rubber Co.	672.00	0.00	672.00
Indian Head Industries	628.00	701.60	1,329.60
Ingersoll-Dresser	1,400.00	500.00	1,900.00
James Walker Mfg. Co.	1,413.00	500.00	1,913.00
Mortell Co.	1,188.50	832.00	2,020.50
Norton Co.	586.00	500.00	1,086.00
The Okonite Co.	628.00	701.60	1,329.60
Owens-Corning Fib. Corp.	630.00	98.64	728.64
Owens-Illinois, Inc.	13,043.67	4,164.80	17,208.47
PPG Indus., Inc.	3,790.00	672.99	4,462.99
Pittsburgh Corning	4,000.00	438.40	4,438.40
Plibrico Co.	681.25	0.00	681.25
Quaker Constr. – Cal.	1,528.00	500.00	2,028.00
Quaker Constr. – Det.	662.00	0.00	662.00
Sherwin-Williams Co.	1,187.50	500.00	1,687.50
USX Corp.	4,195.76	536.11	4,731.87
Vellumoid, Inc.	218.75	0.00	218.75
Viking Pump, Inc.	287.50	0.00	287.50
Warren Pump, Inc.	11,991.50	6,640.00	18,631.50

/s/ Peter L. Shaw
General Orders 1.8, 6.3(e)

EXHIBIT B PAGE 1 OF 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs/Appellants, vs. ACANDS, INC., et al., Defendants/Appellees.	No. 94-55624 DC# CV-93-1120-JSR Southern California ORDER (Filed Apr. 19, 1996)

Before: Peter L. Shaw, Appellate Commissioner

Within 30 days of this order, defendants shall submit applications for attorneys fees and double costs to be awarded as sanctions against plaintiffs' attorney pursuant to the terms of this court's April 16, 1996 memorandum disposition. *See* 9th Cir. R. 39-1.6. Each application shall state with particularity the claimed amounts and reasons therefore. *See* Fed. R. App. P. 39. Within 45 days of the date of this order, plaintiffs' attorney may file a response to defendants' submissions.

/s/ Peter L. Shaw
General Order 6.3(e)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CREIGHTON MILLER, Administrator for the Estates of Isaac W. Abraham, et al. Plaintiff, v. AC and S, Inc., et al., Defendants.	CIVIL NOS. 93-1119(R) (RCM) & 93-1120(R) (RCM) ORDER GRANTING MOTIONS TO DISMISS
NORMAN ABAR, et al., Plaintiffs, v. AC and S Inc., et al., Defendants.	(Filed Jan. 18, 1994)

The instant actions are before me on several Defendants' motions to dismiss. For the reasons given below, I am dismissing these Complaints, as to all Defendants.[1]

I. Facts

The present Complaints are virtually identical, differing only in the length of their captions: the listing of Plaintiff's decedents and Defendants in *Miller* occupies

[1] Pursuant to Southern District of California Local Rule 7.1(d)(1), I find this motion suitable for decision without oral argument.

some eight and a half pages, and the listing of Plaintiffs and Defendants in *Abar* occupies some twenty one and a half pages.

In *Miller*, an administrator for the estates of 370 decedents brought suit against 93 Defendants. In the second complaint, Abar is the first of 994 named Plaintiffs suing the same 93 Defendants named in *Miller*.

The allegations, such as they are, take a scant four and a half pages for each case.

It is alleged that jurisdiction arises by virtue of the claims being admiralty and maritime claims. Initially, diversity of citizenship was also claimed. With the one exception of the citizenship of the administrator in *Miller*, however, the citizenship of the parties did not appear anywhere in the Complaints. And in their opposition to the Defendants' motions, Plaintiffs' counsel has dropped the claim that jurisdiction is based on diversity.

It is stated in the Complaints that: "Defendants . . . sold . . . asbestos-containing products . . . for placement on vessels upon which Plaintiffs or Plaintiff's decedents served during periods of time when the respective mariners as crewmen [and] were exposed to" asbestos. Apart from paragraphs alleging the legal conclusions of proximate cause, negligence, and damages, that sentence is the sum and substance of the short and plain statement of the grounds upon which the court's jurisdiction depends, as well as the short and plain statement of the claim showing that the pleaders are entitled to relief. Fed. R. Civ. P. 8(a)(1) and (2).

II. Discussion

Defendants raise various arguments in support of their motions to dismiss. I find that two are dispositive: first, as they stand, the Complaints do not meet the requirements of Fed. R. Civ. P. 20; and second, the Complaints fail to comply with Fed. R. Civ. P. 8(a).

A. Improper Joinder

Rule 20(a) of the Federal Rules of Civil Procedure provides that:

> [a]ll persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Rule 20 thus imposes two requirements for joinder of plaintiffs: an occurrence or set of occurrences common to all plaintiffs: and a common issue of law or fact.

Rule 20 provides similar requirements for joinder of defendants:

> [a]ll persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Here the Complaints fail to allege the same transaction or occurrence or series of transaction [sic] or occurrences. "No allegation is made (for example) that the individual plaintiffs suffered exposure to products of any defendant at the same time [or] at the same place." *In the Matter of Asbestos II Consolidated Pretrial,* 1989 WL 56181 (N.D. Ill.). Indeed, time and place are not alleged at all. There is no attempt at individualization or description of particular circumstances and exposures of the individual decedents or individual Plaintiffs. Nor is there any attempt to individualize or describe the products and Defendants alleged to have been responsible. In addition, distinct claims cannot be joined under Rule 20 merely because they have common theoretical underpinnings. *Saval v. BL, Ltd.,* 710 F.2d 1027, 1031-2 (4th Cir. 1983).

It is true that Fed. R. Civ. P. 21 prohibits dismissal of a case for misjoinder. Rule 21 also states, however, that the Court may, upon its own initiative at any stage of the action, drop parties who are misjoined "on such terms as are just."

Because I find that the parties in these Complaints are improperly joined, I order all those but the first named Plaintiff – or in the case of *Miller,* all Plaintiff's decedents but the first named decedent, Isaac W. Abraham, Sr. – be dropped.[2] This Order is without prejudice to the dropped Plaintiffs – or Creighton Miller on

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[2] In support of this ruling, I note that when deciding whether parties are properly joined, "there can be no hard and fast rule, and that the approach must be a general one of *whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend* jointly [the several claims] against them. . . . " *Eastern Fireproofing Co. v. U.S. Gypsum Co.,*

behalf of the other individual decedents – instituting suit based on the claims attempted to be set forth in the present Complaints. Any such filing must be accompanied by the appropriate filing fee, however, and must satisfy the jurisdictional, pleading, and venue requirements of federal law and the Federal Rules of Civil Procedure.

B. Failure to Comply with Fed. R. Civ. P. 8(a)

I also find that the Complaints in these matters fail to comply with Fed. R. Civ. P. 8(a), on two grounds.

First admiralty jurisdiction requires that the plaintiff show that: (1) the wrong occurred in navigable waters; and (2) the wrong bears a significant relationship to traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1949); *see also Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 969-70 (9th Cir. 1983); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1120-21 (9th Cir. 1984); *Martinez v. Pacific Industrial Service Corp.*, 904 F.2d 521, 523 (9th Cir. 1990).

Plaintiffs are the parties seeking to invoke this Court's jurisdiction. Accordingly, plaintiffs always bear the burden of establishing subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (stating that "a federal court is presumed to lack jurisdiction unless the contrary affirmatively appears"). Dismissal can follow where a complaint fails

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160 F.Supp. 580, 581 (D. Mass. 1958) (emphasis added) (as quoted in Wright & Miller, *Federal Practice and Procedure: Civil 2d* 1653, at 382.)

to allege grounds for federal subject matter jurisdiction as required by Rule 8(a)(1), i.e., where the lack of jurisdiction appears from the face of the complaint. *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 881 (5th Cir. 1992); *Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *see generally*, Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial*, 9:77 and 9:80, at pp. 9-14 and 9-15.

Here the Complaints are utterly devoid of specifics. They do not state that any alleged wrong occurred on navigable waters – because they do not allege a specific place for any alleged wrong at all. Similarly, the Complaints do not state that any alleged wrong bears a significant relationship to traditional maritime activity – because again they do not state what specific activities Plaintiff's decedents or Plaintiffs were engaged in when they were allegedly exposed to asbestos. The Complaints rely instead on Plaintiff's decedents' or Plaintiffs' mere status as crewmen on ships allegedly containing asbestos products. The mere status of crewman, however, does not meet either part of the test for admiralty jurisdiction.

Second and perhaps more important, the Complaints also fail to meet the threshold requirement of Fed. R. Civ. P. 8(a)(2) (pleader must set forth short and plain statement of the claim showing that the pleader is entitled to relief). No voyages are identified, for example, nor any specific products. Without facts such as these, Defendants

cannot answer or otherwise respond intelligently to the Complaints.[3]

In sum, because the Complaints on their face do not properly allege the subject matter jurisdiction of this Court, and because they do not meet the threshold requirements of Rule 8(a)(2), they are dismissed.

III. Conclusion

For the reasons given above, in *Abar* all Plaintiffs other than Norman Abar – and in *Miller*, all Plaintiff's [sic] decedents other than Isaac W. Abraham, Sr. – are dropped. In addition, the Complaints of Abar and Miller for the estate of Isaac W. Abraham, Sr. are dismissed for failure to comply with Fed. R. Civ. P. 8(a)(1) and (2). I will give Plaintiffs' counsel 21 days leave to amend.

IT IS SO ORDERED.

Date: 1/18/94

/s/ John S. Rhoades, Sr.
JOHN S. RHODES, SR.
UNITED STATES
DISTRICT JUDGE

Copies to:

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[3] I note that in their opposition, Plaintiffs' counsel attempt to remedy the defects of these Complaints. They offer general statements such as, for example, the statement that the plaintiffs "were seamen exposed to asbestos while performing traditional maritime activities."

This strategy is unavailing, however, for "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985).

Federal Rule of Appellate Procedure 38:

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON S. MILLER, Administrator of the Estate of ISAAC W. ABRAHAM, SR., et al.,	)	CASE NO. 94-55677
Plaintiffs and Appellants,	)	U.S. District Court No. 93-1119S-JSR (CM) (San Diego)
v.	)	
ACandS, Inc., et al.	)	
Defendants and Appellees.	)	

On Appeal from the United States District Court
for the Southern District of California
(Honorable John S. Rhoades, United States District Judge)

BRIEF OF DEFENDANT-APPELLEE
OWENS-ILLINOIS, INC.

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* * *

C. The District Court Exercised Its Sound Discretion In Denying Plaintiffs' Rule 60(b)(6) Motion.

In determining whether the District Court exercised its discretion in denying the Rule 60(b)(6) motion, this Court's analysis is informed by the particular requirements of the rule, which "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). A brief examination of Judge Rhoades' order shows the standards imposed by the Rule were clearly met. Additionally, Jaques' conduct regarding his use of the Rule and the filing of this appeal merits sanctions for filing a frivolous appeal.

1. Mr. Jaques Should Be Assessed Sanctions For His Conduct In This Court And The District Court.

As a preliminary matter, plaintiffs' filing of this appeal is frivolous and made in bad faith. By its terms Rule 60(b)(6) applies only to *final* judgments or orders. *See* Fed. R. Civ. Proc. 60(b) ("the court may relieve a party . . . from a final judgment order, or proceeding"); *Craig v. M/V Peacock on Complaint of Edwards*, 760 F.2d 953, 954 (9th Cir. 1985) (Rule 60(b) inapplicable to order not final and appealable). An order granting a motion to dismiss a complaint with leave to amend is certainly not final, since by the simple process of amendment, plaintiffs can continue their actions. Thus, since no final order existed, plaintiffs' Rule 60(b)(6) was improperly stated and Judge Rhoades exercised proper discretion in denying the motion.

Indeed, Owens-Illinois contends that because Judge Rhoades had no authority to rule on plaintiffs' motion, this appeal is frivolous. On that basis, this Court is without jurisdiction, except perhaps to assess attorneys' fees and costs against plaintiffs' counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure. *See Amwest Mtgg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991); *Operating Engineers Pension Trust v. Cecil Backhoe Service*, 795 F.2d 1501, 1508 (9th Cir. 1986); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (appeal is considered frivolous if "the result is obvious or the appellant's arguments of error are wholly without merit."). Jaques' conduct both before this Court and in the District Court merit these sanctions. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (basing Rule 38 sanctions on plaintiffs'

"filing of this and thirty-six other cases, which repeatedly raise the same claims [and] has become burdensome and costly to the litigants").

In this case, based on Leonard Jaques' repeated abuse of the federal court system, sanctions should be assessed against Jaques personally. This Court has recently upheld such an award. *Smith v. Ricks*, 94 C.D.O.S. 6130, 6134 (9th Cir. Aug. 12, 1994).

2. No Grounds Existed For Rule 60(b) Relief.

Even if Rule 60(b)(6) did apply, several points demonstrate the propriety of the District Court's decision. First, the rule warrants relief only if the movant can show "extraordinary circumstances" which are found to be "appropriate to accomplish justice." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982) (citations omitted). The Ninth Circuit recently held that "[t]he rule is to be utilized *only* where extraordinary circumstances *prevented* a party from taking timely action to prevent or correct an erroneous judgment." *Alpine Land & Reservoir*, 984 F.2d at 1049. As Judge Rhoades pointed out in his opinion, plaintiffs presented no such extraordinary circumstances. Plaintiffs were given leave to amend, and declined to utilize the time allotted to retain their legal rights. Although plaintiffs contended that the applicable statutes of limitations had run, this argument is unsound: since the district court granted plaintiffs leave to *amend* their complaint, any amendment would relate back to the filing of the original complaint and there would be no

statute of limitations problem, assuming there was no such problem with the original complaint.

Plaintiffs also attempted to complicate the issue on their Rule 60(b)(6) motion by claiming that unless the cases were transferred to the United States District Court in the Northern District of Ohio, they would have lost all rights to their claims. Again, this

* * *

this action has been dismissed and plaintiffs have failed to amend their complaints. There is very simply no action to transfer.

Even if there were an action to be transferred, plaintiffs have not even begun to meet the showing required for a § 1404 transfer. *See Commodity Futures Trading Comm'n*, 611 F.2d at 279 (movant had the burden to justify by *"particular circumstances"* that the transferor forum was inappropriate (emphasis added)). Plaintiffs presented no argument, in this appeal or in the court below, which satisfied the grounds of convenience of the parties and witnesses or, indeed, the service of the interest of justice. As discussed above, plaintiffs' statute of limitations argument is specious and self-serving. With such a limited showing, this Court cannot find any abuse of discretion on Judge Rhoades' part in denying the untimely transfer request.

Finally, plaintiffs' request is a blatant instance of improper forum shopping, similar to the filing of identical suits in different federal courts, and of filing thousands of lawsuits in assorted district courts across the country. Plaintiffs have already chosen their forum, are

dissatisfied with a ruling there, and now seek transfer in the hopes of avoiding that ruling. This is an inappropriate use of § 1404, and Judge Rhoades' rejection of this effort is entirely proper and within the sound discretion of the District Court.

VI. CONCLUSION

This appeal should be dismissed for lack of appellate jurisdiction, and sanctions assessed, under Rule 38 of the Federal Rules of Appellate Procedure, against Leonard Jaques for his frivolous appeal and abuse of the federal court system. Even if this Court finds that it has jurisdiction over this appeal, the District Court's ruling denying

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiff(s) and Appellant(s), v. ACandS, INC., et al. Defendants and Appellees.	)	CASE NO. 94-55624 U.S. District Court No. 93-1120R-JSR (CM) (San Diego)

On Appeal from the United States District Court
for the Southern District of California
(Honorable John S. Rhoades, United States District Judge)

BRIEF OF DEFENDANT-APPELLEE OWENS-ILLINOIS, INC.

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1. Mr. Jaques Should Be Assessed Sanctions For His Conduct In This Court And The District Court.

As a preliminary matter, plaintiffs' filing of this appeal is frivolous and made in bad faith. By its terms Rule 60(b)(6) applies only to *final* judgments or orders. *See* Fed. R. Civ. Proc. 60(b) ("the court may relieve a party . . . from a final judgment order, or proceeding"); *Craig v. M/V Peacock on Complaint of Edwards*, 760 F.2d 953, 954 (9th Cir. 1985) (Rule 60(b) inapplicable to order not final and appealable). An order granting a motion to dismiss a complaint with leave to amend is certainly not final, since by the simple process of amendment, plaintiffs can continue their actions. Thus, since no final order existed, plaintiffs' Rule 60(b)(6) was improperly stated and Judge Rhoades exercised proper discretion in denying the motion.

Indeed, Owens-Illinois contends that because Judge Rhoades had no authority to rule on plaintiffs' motion, this appeal is frivolous. On that basis, this Court is without jurisdiction, except perhaps to assess attorneys' fees and costs against plaintiffs' counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure. *See Amwest Mtgg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991); *Operating Engineers Pension Trust v. Cecil Backhoe Service*, 795 F.2d 1501, 1508 (9th Cir. 1986); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (appeal is considered frivolous if "the result is obvious or the appellant's arguments of error are wholly without merit."). Jaques' conduct both before this Court and in the District Court merit these sanctions. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (basing Rule 38 sanctions on plaintiffs'

"filing of this and thirty-six other cases, which repeatedly raise the same claims [and] has become burdensome and costly to the litigants").

In this case, based on Leonard Jaques' repeated abuse of the federal court system, sanctions should be assessed against Jaques personally. This Court has recently upheld such an award. *Smith v. Ricks*, 94 C.D.O.S. 6130, 6134 (9th Cir. Aug. 12, 1994).

2. No Grounds Existed For Rule 60(b) Relief.

Even if Rule 60(b)(6) did apply, several points demonstrate the propriety of the District Court's decision. First, the rule warrants relief only if the movant can show "extraordinary circumstances" which are found to be "appropriate to accomplish justice." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982) (citations omitted). The Ninth Circuit recently held that "[t]he rule is to be utilized *only* where extraordinary circumstances *prevented* a party from taking timely action to prevent or correct an erroneous judgment." *Alpine Land & Reservoir*, 984 F.2d at 1049. As Judge Rhoades pointed out in his opinion, plaintiffs presented no such extraordinary circumstances. Plaintiffs were given leave to amend, and declined to utilize the time allotted to retain their legal rights. Although plaintiffs contended that the applicable statutes of limitations had run, this argument is unsound: since the district court granted plaintiffs leave to *amend* their complaint, any amendment would relate back to the filing of the original complaint and there would be no

statute of limitations problem, assuming there was no such problem with the original complaint.

Plaintiffs also attempted to complicate the issue on their Rule 60(b)(6) motion by claiming that unless the cases were transferred to the United States District Court in the Northern District of Ohio, they would have lost all rights to their claims. Again, this

* * *

Comm'n, 611 F.2d at 279 (movant had the burden to justify by *"particular circumstances"* that the transferor forum was inappropriate (emphasis added)). Plaintiffs presented no argument, in this appeal or in the court below, which satisfied the grounds of convenience of the parties and witnesses or, indeed, the service of the interest of justice. As discussed above, plaintiffs' statute of limitations argument is specious and self-serving. With such a limited showing, this Court cannot find any abuse of discretion on Judge Rhoades' part in denying the untimely transfer request.

Finally, plaintiffs' request is a blatant instance of improper forum shopping, similar to the filing of identical suits in different federal courts, and of filing thousands of lawsuits in assorted district courts across the country. Plaintiffs have already chosen their forum, are dissatisfied with a ruling there, and now seek transfer in the hopes of avoiding that ruling. This is an inappropriate use of § 1404, and Judge Rhoades' rejection of this effort is entirely proper and within the sound discretion of the District Court.

VI. CONCLUSION

This appeal should be dismissed for lack of appellate jurisdiction, and sanctions assessed, under Rule 38 of the Federal Rules of Appellate Procedure, against Leonard Jaques for his frivolous appeal and continued abuse of the federal court system. Even if this Court finds that it has jurisdiction over this appeal, the District Court's ruling denying plaintiffs' motion for relief under Rule 60(b)(6) was firmly within the District Court's sound discretion, and must be affirmed.

DATED: October 3, 1994

MORGENSTEIN & JUBELIRER

By: /s/ Bruce A. Wagman
Bruce A. Wagman
Attorneys for Defendant and Appellee Owens-Illinois, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

MOTION TO VACATE SUMMARY IMPOSITION OF RULE 38 SANCTIONS, OR, IN THE ALTERNATIVE, FOR STATEMENT OF REASONS AND OPPORTUNITY TO RESPOND

NOW COMES ALAN KELLMAN, counsel for the Appellants, by and through **THE MARITIME ASBESTOSIS LEGAL CLINIC,** a division of **THE JAQUES ADMIRALITY LAW FIRM, P.C.,** and pursuant to Fed. R. App. P. 38 as amended April 29, 1994, respectfully moves the Court to vacate its premature and procedurally defective imposition of sanctions set forth in its Memorandum dated April 16, 1996.

In the alternative, counsel moves the Court for a statement of reasons for its conclusion that the subject appeals were frivolous, and for an opportunity to respond in writing and show cause why sanctions should not be imposed.

FACTS

By Memorandum dated April 16, 1996 (Exhibit "A"), a panel of the Court rejected the appeal and affirmed the decisions of the District Court. The final paragraph of the Memorandum (Page 6) recites in full:

> Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

Pursuant to the award of sanctions in the Court's Memorandum, on April 19, 1996 the Appellate Commissioner issued an Order for the defendant-appellees to submit applications for double costs and attorneys' fees within 30 days, and for plaintiffs' counsel to respond to those applications within 45 days. Exhibit "B".

The Memorandum Disposition and the Commissioner's Order were mailed together, and were received in Detroit by plaintiffs' counsel on April 23, 1996.

THE IMPOSITION OF RULE 38 SANCTIONS WAS PROCEDURALLY IMPROPER.

F.R.A.P. 38, as amended April 29, 1994, effective December 1, 1994, now provides:

> If a court of appeals determines that an appeal is frivolous, it may, ***after a separately filed motion or notice from the court and reasonable opportunity to respond,*** award just damages and single or double costs to the appellee.

(Emphasis supplied.) As the Advisory Committee Note to the 1994 amendment explains:

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. Requests in briefs for sanctions have become so commonplace that it

> is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is not such motion filed, notice must come from the court.

One commentator on federal procedure notes (9 *Moore's Federal Practice* ¶ 238.04 at Pages 38-20, 38-21) that promulgation of the amended Rule has settled a previous split of authority over proper procedure to be followed in imposing sanctions. The commentator goes on to state:

> What constitutes notice? A statement or request in a brief does not. Only a separately filed motion is sufficient; absent a motion, the notice must come from the court.

As a panel of this Court wrote on March 7, 1996, in denying a request for Rule 38 sanctions:

> Appellees . . . request an award of attorney fees and costs, contending the Gabors' appeal is frivolous. The appellees request these fees only in their appellate briefs and not in a separately filed motion.
>
> The 1994 amendment to Federal Rule of Appellate Procedure 38 permits an award under this rule only "after a separately filed motion or notice from the court and reasonable opportunity to respond." The advisory committee notes to this amendment state that a request for sanctions in a party's appellate brief does not provide sufficient notice to the opposing party.

Gabor v. Frazer, 78 F.3d 459 (9th Cir. 1996) (Exhibit "C").

Although the Court stated in its Memorandum that "Several defendants" had requested sanctions, counsel

has reviewed the briefs and related joinder papers filed by the Appellees and has found only **one** defendant-appellee which requested sanctions, namely Owens-Illinois. *See* Owens-Illinois' Brief in No. 94-55624 at 12-13, 19; Owens-Illinois' Brief in No. 94-55677 at 12-13, 19. **None** of the other Appellees even cited Rule 38 in their papers (*see* the several Tables of Authorities), much less asked for sanctions.

Moreover, Owens-Illinois' request for sanctions in its brief is not the requisite "separately filed motion . . . and reasonable opportunity to respond" mandated by the amended Rule 38. This Court's decision in *Gabor v. Frazer, supra,* as well as cases decided by the various federal Courts of Appeals since the 1994 amendment make it clear that the Rule means what it says. *See Nordberg, Inc. v. Telsmith, Inc.*, 1996 U.S.App.LEXIS 9472 (Fed.Cir., April 24, 1996) (Exhibit "D") (at oral argument, appellee withdrew claim that appeal was frivolous when Court "pointed out that it was substantively and procedurally deficient", noting that Fed. R. App. P. 38 requires separate motion or notice from the court and opportunity to respond); *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995). In *McDonough* the appellee, like Owens-Illinois herein, requested Rule 38 sanctions in her brief. The Seventh Circuit stated, "We cannot honor such a request." Noting that the amended rule requires a separate motion or notice from the court, the Court held that "Ms. McDonough's brief-borne request is not a separately filed motion." Accordingly, the Court would "defer final determination" of the sanctions issue until respondent had an opportunity to respond. 48 F.3d at 259.

This Rule is consistent with prior decisional law of this Circuit with respect to proper notice prior to imposition of attorney sanctions. In *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 836 (9th Cir. 1987), this Court stated that the requirement for notice and opportunity to be heard prior to imposition of sanctions upon an attorney ensure that

> (1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attornys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

834 F.2d at 836.

In *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1082-83 (9th Cir. 1988), the Court overturned an award of sanctions, holding that two days notice of hearing to consider sanctions under a local court rule was insufficient. *See also Ford v. Alfaro*, 785 F.2d 835, 840 (9th Cir. 1986) (where counsel failed to file pretrial statement and failed to attend pretrial conference; sanctions imposed, it was abuse of discretion for court to impose sanctions without first giving notice of intent to do so and affording opportunity for a hearing).

Since respondent was not afforded the due process required by the rule, the Court should set aside its award of sanctions. In the alternative, at a minimum this Court must furnish the "notice from the court and reasonable

opportunity to respond" that Rule 38 mandates. Respondent notes that Ninth Circuit Rule 36-1 defines a "Memorandum" as a "written, **reasoned** disposition of a case or motion which is not intended for publication". (Emphasis supplied.) Respondent respectfully submits that the bare statement that "The Court agrees [that this appeal was frivolous]" is not adequate notice, and requests that the Court, should it decide to proceed further with this matter, issue an order to show cause detailing the basis for its Rule 38 inquiry and giving respondent at least 14 days to respond in writing.

Respondent also prays that the Court vacate its premature reference to the Appellate Commissioner. As shown by the Exhibit "B" Order, a schedule has been established for submission of fee applications and responses thereto. This effort is premature until and unless sanctions have been awarded pursuant to the Rule. *Cf.* Circuit Rule 30-2 ("Counsel will be provided notice and have an opportunity to respond ***before*** sanctions are imposed.") (Emphasis added.)

CONCLUSION

For the reasons set forth in this Motion, counsel prays that Court set aside its hasty and procedurally infirm award of sanctions. At a minimum, this Court should provide respondent with a statement of reasons and an opportunity to show cause why sanctions should not be imposed.

DATED at Detroit, Michigan this 29th day of April, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORMAN D. ABAR; HORACE J. ABBOTT; VANCE ABEL; CLARENCE ABNER; EARL ADAMS, et al., Plaintiffs-Appellants, vs. ACandS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ACORN IRON AND SUPPLY CO.; ALLIS-CHALMERS CORPORATION; et al., Defendants-Appellees.	No. 94-55624 D.C. No. CV-93-01120-JSR
CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellant. vs. ACandS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ANCHOR PACKING CO.; AURORA PUMP DIVISION OF GENERAL SIGNAL CORP.; BETHLEHEM STEEL CORPORATION; BIGELOW-LIPTAK CORPORATION;	No. 94-55677 D.C. No. CV-93-01119-JSR

BRYAN STEAM CORP.; COFFIN PUMP INC.; CROWN, CORK AND SEAL CO., INC.; DANA CORP.; DONLEE TECHNOLOGIES, INC.; DURABLA MANUFACTURING CO.; EVERLASTING VALVE CO.; FEL-PRO INCORPORATED; FIBREBOARD CORPORATION; GENERAL CABLE CO.; B.F. GOODRICH; GOODYEAR TIRE & RUBBER CO.; INGERSOLL-DRESSER PUMP; JOHN CRANE INC.; MORTELL CO.; OWENS-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS, INC.; USX CORPORATION; WARREN PUMPS, INC.; PITTSBURGH CORNING CORPORATION,

Defendants-Appellees.

ORDER

(Filed Jun. 7, 1996)

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,*** District Judge.

Appellants' Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond, is denied.

*** Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55624
CT/AG#: CV-93-01120-JSR

NORMAN D. ABAR; HORACE J. ABBOTT; VANCE ABEL; CLARENCE ABNER; EARL ADAMS, et al.,

Plaintiffs-Appellants

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ACORN IRON AND SUPPLY CO.; ALLIS-CHALMERS CORPORATION; et al.,

Defendants-Appellees

No. 94-55677
CT/AG#: CV-93-01119-JSR

CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al.,

Plaintiff-Appellant

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ANCHOR PACKING CO.; AURORA PUMP DIVISION OF GENERAL SIGNAL CORP.; BETHELEHEM STEEL CORPORATION; BIGELOW-LIPTAK CORPORATION; BRYAN STEAM CORP.; COFFIN PUMP INC.; CROWN, CORK AND SEAL CO., INC.; DANA CORP.; DONLEE TECHNOLOGIES, INC.; DURABLA MANUFACTURING CO.; EVERLASTING VALVE CO.; FEL-PRO INCORPORATED; FIBREBOARD CORPORATION; GENERAL CABLE CO.; B.F. GOODRICH; GOODYEAR TIRE & RUBBER CO.; INGERSOLL-DRESSER PUMP; JOHN CRANE INC.; MORTELL CO.;

OWENS-CORNING FIBER GLAS CORP.; OWENS-ILLINOIS, INC.; USX CORPORATION; WARREN PUMPS, INC.; PITTSBURGH CORNING CORPORATION

Defendants-Appellees

(Filed July 8, 1996)

APPEAL FROM the United States District Court for the Southern District of California (San Diego).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 16, 1996

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

MAY 10 1996

by: /s/ Illegible
Deputy Clerk